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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-1529

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Petitioner,

against

TIMOTHY G. MORGAN,

Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions and Orders Below

The final order of the Court of Appeals for the Second Circuit, which affirmed without opinion the District Court's decision and order granting respondent's petition for a writ of habeas corpus, is reported at 516 F. 2d 897 and is reproduced in the appendix at 120a. The decision and order of the United States District Court for the Northern District of New York granting the writ of habeas corpus is unreported and is reproduced in the appendix at 113a. An earlier opinion of the District Court denying the writ of habeas corpus and an order of the Court of Appeals remanding for an evidentiary hearing are reproduced in the appendix at 25a and 29a respectively.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on May 12, 1975. The petition for certiorari was filed on June 5, 1975. Certiorari was granted on October 6, 1975.

Question Presented

Does Due Process require that a guilty plea be set aside when a defendant is not formally advised of each legal element of the crime to which he pleaded, where the plea is otherwise unassailable and the defendant admits the act charged?

Statement of the Case

A. Facts

On the night of April 6, ~~1975~~ 1965, Mrs. Ada Francisco was brutally murdered in her home in Fulton County, New York, by an assailant who stabbed her more than forty times (67a, 85a). Respondent Timothy Morgan was convicted of that murder, which occurred while he was working on the victim's farm (99a). Morgan, who was then eighteen years of age with an intelligence quotient of approximately 40-75 (99a, 102a, 108a), but who was found competent to stand trial after three weeks of psychiatric evaluation (91a, 107a), was working on the farm as part of his program at the nearby Rome State School (64a, 87a, 99a, 101a). There apparently had been a dispute between Ada Francisco and respondent (64a, 100a), and on that evening Mr. Morgan took a knife to Mrs. Francisco's room and killed her there (60a, 65a, 100a, 101a). He took a very small sum of money and fled in the victim's car (60a,

65a, 102a). Later, some 100 miles away, he was involved in an accident and was promptly arrested (60a, 65a). The knife was found in the car (65a). Morgan gave a confession to the police (59a, 60a, 65a, 68a).

B. Arraignment

Mr. Morgan was indicted for first degree murder,* and on April 15, 1965, was arraigned before the Honorable Justice Soden of the Supreme Court, Fulton County. At that time, the court assigned two lawyers, Robert Best and Floyd Reinhart, to represent the respondent. Morgan stated that he had consulted with these counsel (84a) who were praised by the trial court as "very competent men" (85a). The indictment for first degree murder was read out in open court, charging respondent with "willfully . . . and of malice aforethought" stabbing and killing Ada Francisco (85a). Morgan was advised that he was entitled to a jury trial and he stated he understood this right (86a). That Morgan understood the question is further evidenced by the fact that when he did not understand a question, he said so (86a, 87a). The trial court stated that it would cooperate with defense counsel "at any hour of the day or night" (88a).

C. Plea

On June 8, 1965, Morgan pleaded guilty to murder in the second degree. The prosecutor recommended this plea at the request of respondent (91a). Both defense counsel and some members of Morgan's family were present (96a). The trial court recognized that it was dealing with a defendant of low intelligence, and was anxious to make sure that respondent genuinely understood what was going on (93a). Morgan stated he understood that he was accused

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* The death penalty was in effect at this time for first degree murder. However, by the time Morgan pleaded guilty to murder in the second degree, the death penalty had been abolished in New York with exceptions not applicable here.

of killing Ada Francisco (93a), that he was accused of murder in the first degree for which the penalty was life in prison (93a), that by pleading guilty he was waiving a trial by jury (93a, 94a), that he had consulted with and was pleading with advice of counsel (94a), and that he knew he would be sent to prison (94a).

D. Sentence

On June 15, 1965, Morgan was sentenced to an indeterminate term of twenty-five years to life. Defense counsel gave a lengthly statement to the court on the defendant's background and the circumstances of the crime (98a-102a). He pointed out that the defendant was of limited intelligence, had a history of trouble in school, and had developed a belligerent disposition (98a). Morgan was for a time at Rome State School and had been released from there to work for the victim, Ada Francisco, on her farm (99a).

According to defense counsel, the defendant developed a liking for a young lady in a nearby village and enjoyed going there on his bicycle to visit her (100a). On several occasions, counsel suggested, Morgan returned home late to the consternation of Mrs. Francisco, who allegedly once slapped him. Hostility grew between Morgan and Mrs. Francisco over this problem (100a). Morgan feared he might be returned to Rome State School and decided to collect the wages due him and leave (100a-101a). When he went to Mrs. Francisco's room with a knife, "he meant no harm to that lady" (100a). However, when he woke Mrs. Francisco, she began to scream, and the defendant, with his "uncontrollable and ungovernable temper" and "in order to stop the screaming and in the excitement and tension of it all", committed an "assault" resulting in Mrs. Francisco's death (101a). The District Attorney disputed counsel's version of the facts (106a).

Before passing sentence, the court stated that it had studied the pre-sentence report, a Family Court report,

and the defendant's records from Rome State School (106a-107a). The court again noted that Morgan was represented by two highly qualified lawyers, calling them "perhaps the best qualified and best informed lawyers in this type of work in this area", and noted that there had been many conferences on the case so that "all the possible facts, psychological, social and legal data" had come forth (107a). The court stated that it had analyzed the report of psychiatrists from Utica State Hospital, who, after three weeks of examination, concluded that Morgan was competent to stand trial and make his defense (107a). The court appreciated that the case had given defense counsel some difficulties (108a). Finally, the court made it clear that it was aware of the defendant's limited intelligence and was taking this into account (108a). The court then passed judgment. The record indicates no surprise or disappointment by Morgan or his counsel when the sentence was pronounced (108a-109a).

E. Post Conviction Proceedings in State Court

Morgan did not appeal from his judgment of conviction, nor did he make any motion to withdraw his plea. In August, 1970, more than five years after his conviction, Morgan applied for a writ of error coram nobis in Supreme Court, Fulton County. He alleged that his plea of guilty was involuntary and not entered knowingly and intelligently in that he was unaware of the consequences of his plea and unaware that intent was an element of the crime of murder in the second degree. The application was denied without a hearing May 29, 1971.* The Appellate Division affirmed without opinion (*People* v. *Morgan*, 38 App. Div. 2d 1012 [3rd Dept. 1972]) and leave to appeal to the Court of Appeals was denied July 6, 1972.

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* The Court's written decision is reproduced in the appendix at 110a-112a.

F. Petition for Habeas Corpus in Federal Court

Following the rejection of his claim in the state courts, Morgan petitioned in federal court for a writ of habeas corpus. Morgan claimed that the trial court failed to ascertain the factual basis of the plea and that no one told him the elements of the crime to which he pleaded or the consequences of his plea (8a-24a). The United States District Court for the Northern District of New York (Port, J.) denied the application by memorandum and decision dated September 26, 1973 (25a-28a). However, the United States Court of Appeals for the Second Circuit on December 12, 1973, reversed and remanded for an evidentiary hearing "on the issues raised by petitioner [respondent], including whether at the time of his entry of his guilty plea, he was aware that intent* was an essential element of the crime and was advised of the scope of punishment that might be imposed" (29a).

G. Evidentiary Hearing in Federal Court

At the evidentiary hearing held in Auburn, New York on May 3, 1974, Morgan testified that at the time of sentence he did not know what sentence he would receive (35a-36a). He specifically claimed that he did not know that he would get as much as 25 years to life (36a, 42a). Had he known what sentence was going to be imposed, he would not have pleaded guilty (42a). He only thought that by pleading he would get a "lesser sentence" which he expected would be something less than life (38a-41a). He claimed he was never told what the lesser sentence would be (41a), but said he got a heavier sentence than he expected (38a-39a). Respondent said he never asked what his sentence would be, because "I figured they [counsel] knew what they were doing" (41a). Morgan claimed that he was not satisfied with his two counsel (38a).

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* The actual wording of the statute then in effect was "design to effect death". Former New York Penal Law § 1046.

Morgan also claimed that he did not know at the time of his plea that intent was an element of the crime of murder in the second degree (34a). Had he known this, he would not have pleaded guilty because he did not intend to kill Mrs. Francisco (34a, 37a). Morgan learned the elements of murder in the second degree from "friends" at Auburn State Prison some five years later (33a-34a).

Andrew Schulsberg, the prosecutor, testified that there was discussion with the Judge and defense counsel concerning a plea. Respondent's brothers and sisters, and possibly his mother, were present in the Court that day (45a-46a).

Morgan's two attorneys in the state court proceedings were called as witnesses by the State. The first, Mr. Reinhart, testified that he was an experienced attorney in criminal law, having practiced over forty years (55a). He was assigned to represent respondent at the arraignment (50a). He discussed the case with his client, the prosecutor and respondent's family; made various motions, tried to obtain the confession, and unsuccessfully tried to change venue (50a). He advised his client that first degree murder at that time was punishable by death (50a, 51a). Mr. Reinhart felt that a plea to manslaughter would satisfy the needs of justice, but stated that the prosecutor would not consent (51a, 52a, 53a). Mr. Reinhart also testified that in his view of the case, a first degree murder conviction was a distinct possibility (52a, 61a, 62a). He testified he did not expect much consideration from a jury (61a).

Mr. Reinhart testified that he discussed the proposed plea to murder in the second degree with respondent's family, and that he bargained with the prosecutor for a manslaughter plea (51a, 52a, 53a). By the time of the plea, the death penalty had been eliminated and Morgan was faced with possible alternatives of acquittal or mandatory life sentence following conviction on a trial for first degree murder, or a sentence carrying a minimum of twenty

years on a plea to murder in the second degree (53a, 54a). Mr. Reinhart knew exactly what the sentence would be on the proposed plea and so advised his client (54a, 55a, 56a, 58a, 62a), although when recalled at the close of the hearing, Mr. Reinhart said that he may have only told Morgan "twenty-five years" instead of "twenty-five to life" (77a).

Mr. Reinhart stated that he distinguished first degree and second degree murder by the sentence rather than by the necessary proof, because "(a)s a rule, a defendant is only interested in the sentence, and the time" (57a). He did not point out the elements of the crime to respondent (59). Mr. Reinhart noted that he had obtained the confession and was familiar with the facts of the case (50a, 59a). He stated that his co-counsel, Mr. Best, talked with Morgan more than he did and went "very thoroughly, into the law" (61a).

Morgan's other assigned attorney was also called as a witness by the State. Mr. Robert Best testified that he carefully discussed the facts of the case with Morgan and that his client was told what penalty he would receive in exchange for his plea (63a-66a). He thought, but could not be sure, that he had discussed the elements of the crime with respondent. He testified:

> "I think I recall talking to him in the jail and telling him that if this was the case it could be murder one; and if this was the case it could be murder 2 or manslaughter, if he had intent and thought it over beforehand and if he didn't have premeditation it could be manslaughter" (68a).

No notes could be found concerning this conversation. Mr. Best also testified that he was well aware that differences in grades of homicide were extremely important in analysis of the case, and that discussions with Morgan were structured to take this into account (70a-71a).

H. Opinion of the District Court

On October 29, 1974, the District Court granted the writ. The District Court found that Morgan was advised as to the consequences of his plea, resolving the conflict of testimony on this point in favor of respondent's attorneys and against respondent. However, the District Court found that respondent was not advised by court or counsel prior to his plea of the elements required to be established for any degree of homicide. The District Court noted that Mr. Best only *thought* he had so advised Morgan. Citing the statement in *McCarthy* v. *United States,* 394 U.S. 459, 466 (1969), that "a guilty plea is an admission of all the elements of a formal criminal charge [and] it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts", the District Court found Morgan's guilty plea to be involuntary as a matter of law. The District Court cited no other factor as bearing on the voluntariness of the plea.

I. Order of the Court of Appeals

On May 12, 1975, the United States Court of Appeals for the Second Circuit affirmed, without opinion, the judgment of the District Court.

Summary of Argument

Timothy Gordon Morgan pleaded guilty in a New York state court more than a decade ago to the vicious slaying of his benefactor. The proof against Morgan, which included a confession, was overwhelming. Throughout the entire proceedings Morgan had the advice and assistance of two experienced counsel who devoted much time and effort in his behalf. The proceedings were eminently fair and were conducted with great dignity and solicitude for the defendant by both court and counsel. The record is abundantly clear that Morgan knowingly and voluntarily

pleaded guilty to murder in the second degree in order to obtain a lesser sentence and in order to avoid the certainty of conviction after trial for murder in the first degree. Morgan, who has never denied the slaying and in fact admitted it to his attorneys, did not challenge his guilty plea until five years had passed, a delay which has never been explained.

The courts below, in complete disregard of the basic principle enunciated by this Court that the voluntariness of a guilty plea must be determined by an examination of all the relevant circumstances, set aside Morgan's clearly unassailable guilty plea solely because he may not have been told that intent was a formal element of the crime to which he pleaded. The order of the United States Court of Appeals affirming the unprecedented opinion of the District Court was unaccompanied by any written opinion.

The courts below adopted a highly formalistic *per se* rule which holds that failure to recite to a defendant the formal legal elements of the crime to which he pleads guilty requires automatic reversal. Such a rule is a triumph of form over substance and has no basis whatsoever in law or practical realities. Further, such a rule, if followed, will have a disastrous impact on the criminal justice system in this country by making untold thousands of otherwise unassailable convictions vulnerable to both collateral and direct attack.

ARGUMENT

Due process does not require that a guilty plea be set aside solely because a defendant was not formally advised of each legal element of the crime to which he pleaded. In ascertaining the voluntariness of a guilty plea, all the relevant circumstances surrounding the plea must be considered.

Morgan's murder conviction for a savage slaying, so cavalierly nullified by the courts below, was based on a voluntary and knowing plea of guilty entered on the advice of experienced counsel in the face of overwhelming proof of guilt. In the circumstances, the plea is unassailable under the most elementary principles of law set forth in applicable decisions of this Court.

A. The voluntariness of a guilty plea can be ascertained only by an examination of all the relevant circumstances surrounding the plea.

A plea of guilty must be voluntary and knowing in order to be valid. *Machibroda* v. *United States,* 368 U.S. 487, 493 (1962); *Waley* v. *Johnston,* 316 U.S. 101, 104 (1942); *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927). The difficulty, however, is ascertaining in any given case whether a plea is or is not voluntary and intelligent. Guilty pleas are taken in a wide variety of legal and factual situations. The motives of defendants who offer guilty pleas are diverse and complex. The guilty plea is often part of an involved "plea bargaining" process which this Court has called "an essential component of the administration of justice." *Santobello* v. *New York,* 404 U.S. 257, 260 (1971). The chemistry of every criminal case is different, depending on such factors as the complexity and nature of the crime charged, range of sentence possibilities, relative strengths of prosecution and defense cases, and the abilities of counsel on both sides. Defendants

themselves range widely in age, background, intelligence, and experience with the criminal justice system.

Compounding the difficulty is the elusive and nebulous character of the concept of voluntariness. In the abstract, "voluntary" connotes a worthy ideal and philosophy central to our jurisprudence in which the value of the individual and his freedom of choice reign supreme.* As a practical matter, however, voluntariness can acquire substantive meaning and content only by reference to concrete and particular factual circumstances.

The decisions of this Court have recognized in a wide variety of situations the practical nature of the inquiry involved in ascertaining the voluntariness of guilty pleas. In *McMann* v. *Richardson,* 397 U.S. 759 (1970), it was held that a plea of guilty based on reasonably competent advice is an intelligent plea not open to attack as being involuntary on the ground that defense counsel may have misjudged the admissibility of the defendant's confession. In *Brady* v. *United States,* 397 U.S. 742 (1970), this Court held that a guilty plea is not invalid merely because entered to avoid the possibility of the death penalty. *North Carolina* v. *Alford,* 400 U.S. 25 (1970), held that an accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though his guilty plea contains a protestation of innocence, where the record strongly suggests evidence of guilt. *Boykin* v. *Alabama,* 395 U.S. 238 (1969) and *McCarthy* v. *United States,* 394 U.S. 459 (1969), enunciated the principle that evidence of voluntariness should be spread upon the record.

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* See Black's Law Dictionary, 4th Ed., West Publishing Co. (1951), p. 1974: "unconstrained by interference; unimpelled by another's influence, spontaneous; acting of oneself . . . (d)one by design or intention, purpose, intended . . . (p)roceeding from the free and unrestrained will of the person . . . (p)roduced in or by an act of choice . . . (r)esulting from choice." [citations omitted]

The underlying principle common to all these cases is that in determining whether a guilty plea is knowing and voluntary, each case must be carefully considered on its own facts. This Court has wisely refrained from importing rigid blanket rules into a difficult and complex area of the law. As was stated in *Brady* v. *United States, supra,* the voluntariness of a plea can be determined only by considering "all of the relevant circumstances." *Brady,* 397 U.S. at 749. Such a flexible approach is sound. It achieves just results in an extremely wide variety of factual situations. It makes the concept of voluntariness a workable and meaningful cornerstone of the criminal law.

The courts below radically departed from this flexible principle in the instant case by holding that failure to inform the respondent of the elements of crime to which he pleaded *per se* rendered his plea involuntary. Not a single other factor was cited as bearing on the voluntariness of the plea. Thus, the courts below erroneously adopted a narrow *per se* rule by completely failing to consider all the relevant circumstances surrounding the plea. The decisions of the courts below are without basis in law and ignore obvious and practical realities.

The sole authority cited by the courts below in adopting a *per se* rule was *McCarthy* v. *United States, supra,* which turned on this Court's supervisory power over the federal courts. *Id.,* at 464. Even if the District Court was correct in its assumption that *McCarthy* is applicable to state defendants, however, neither *McCarthy* itself nor the federal courts mandate the formal recitation of the legal elements. See discussion and cases, *post* at 15-22.

Not only did the courts below erroneously apply a *per se* rule, purportedly derived from *McCarthy* v. *United States,* but they applied the rule to events that occurred prior to the decision in *McCarthy. McCarthy,* however, has been held to be of prospective application only. *Halliday* v. *United States,* 394 U.S. 831, rehearing denied 395

U.S. 971 (1969). Hence *McCarthy,* which was the only authority relied on by the courts below in granting federal habeas relief, is not even applicable to the case at bar. Even the District Court acknowledged that it was looking at the case in the light of new law not in existence at the time of the events in this case (69a, 74a). It is significant that Rule 11, Federal Rules of Criminal Procedure (hereafter "Rule 11"), which states in pertinent part that the federal courts must ascertain the factual basis of a guilty plea entered in their own courts, was not added until 1966. One commentary states that this new provision "requires a comparison of the elements of the crime to which the plea is offered, with the facts of the offense committed by the defendant." Moore's *Federal Practice,* Vol. 8, § 11.03(4), 11.63. Additionally, the federal requirement that the judge address the defendant personally to determine if he understands the nature of the charge was not added to Rule 11 until 1966. These were not even the federal standards in 1965, when respondent pleaded guilty in a state court.

The correct standard to be applied to this pre-*Boykin* plea was the "totality of the circumstances". *Brown* v. *Swenson,* 487 F. 2d 1236, 1240 (8th Cir. 1973), cert. denied 416 U.S. 944 (1974); *United States ex rel. Rogers* v. *Adams,* 435 F. 2d 1372 (2d Cir. 1970), cert. denied 404 U.S. 834, rehearing denied 404 U.S. 996 (1971); *United States ex rel. Grays* v. *Rundle,* 428 F. 2d 1401, 1403 (3rd Cir. 1970). This standard is similar to the "all the relevant circumstances" standard urged here by petitioner as the standard for pleas generally. The pre-*Boykin* and pre-*McCarthy* character of Morgan's plea is itself one of "all the relevant circumstances" that must be considered in assessing its voluntariness.

B. No particular litany or procedure is required to apprise a defendant of the nature of the charge against him. Matters of reality, not form, must be considered controlling. There is no mechanistic *per se* rule that the formal legal elements of a crime must be recited to a defendant prior to a plea of guilty.

Any guilty plea, of course, is not voluntary unless the accused is given "real notice of the true nature of the charge against him." *Smith* v. *O'Grady,* 312 U.S. 329, 334 (1941). See also *McCarthy,* 394 U.S. at 464; Rule 11; American Bar Association, *Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty,* Approved Draft (1968), § 1.4a (hereafter ABA *Minimum Standards*). The utmost solicitude is required to assure that an accused has a "full understanding of what the plea connotes." *Boykin* v. *Alabama,* 395 U.S. at 243-44.

The precise meaning of "nature of the charge" or "what the plea connotes"* has received very little discussion in the cases or literature. However, it is clear that an accused need not necessarily have a full understanding or knowledge of all the formal legal elements of the crime in order to be apprised of the nature of the charge against him. In a recent interpretation of *McCarthy,* the Eighth Circuit ruled that there was no ritual requirement to inform a defendant of the elements and that it was not necessary to explain the elements in order to appprise the accused of the nature of the charge. *Sappington* v. *United States,* 468 F. 2d 1378 (8th Cir. 1972), cert. denied 411 U.S. 970 (1973). The Court denounced the effort "to transform an enunciation of general standards to an ever-lengthening list of specifics, the omission of any one of which will render the entire proceeding 'an exercise in futility'" and stated that "*McCarthy* imposes no require-

* The phrase "what the plea connotes" appears essentially equivalent in meaning to "nature of the charge". Note, *The Supreme Court, 1968 Term,* 83 Harv. L. Rev. 7, 181, 184 (1969).

ment that the Judge mount the bench with a script in his hand." *Sappington,* 468 F. 2d at 1379-1380.

Similarly, the Seventh Circuit has ruled that only the substance of a charge and not the elements need be conveyed to the accused. *United States* v. *Lowe,* 367 F. 2d 44 (7th Cir. 1966). See also *United States* v. *Semet,* 295 F. Supp. 1084, 1087 (E.D. Okla. 1968). Other courts have ruled that reference to a crime by name or its general nature and essence may be sufficient to apprise an accused of the nature of the crime charged. *Bongiorno* v. *United States,* 424 F. 2d 373, 375 (8th Cir. 1970); *People* v. *Reeves,* 25 Ill. App. 3rd 674, 323 N.E. 2d 794 (1975); *People* v. *Heral,* 25 Ill. App. 3rd 806, 323 N.E. 2d 138 (1975). At least two federal Circuits have stated that knowledge of a charge in layman's terms may be sufficient. *Stinson* v. *Turner,* 473 F. 2d 913, 916 (10th Cir. 1973); *United States* v. *Tabory,* 462 F. 2d 352 (4th Cir. 1972). Some decisions have stated that the accused must be made aware of the "meaning" of the charge and the "acts" constituting guilt. *United States* v. *Cantor,* 469 F. 2d 435 (3rd Cir. 1972); *Munich* v. *United States,* 337 F. 2d 356, 359 (9th Cir. 1964); *Edwards* v. *United States,* 256 F. 2d 707, 103 U.S. App. D.C. 152, cert. denied 358 U.S. 847 (1958). Some courts have ruled that a reading of the indictment, information, or statute may in some circumstances suffice to apprise the accused of the nature of the charge. *Paradiso* v. *United States,* 482 F. 2d 409, 413-414 (3rd Cir. 1973); *United States* v. *Semet, supra,* at 1087; *State* v. *Duran,* 109 Ariz. 566, 514 P. 2d 487 (1973); *People* v. *Norman,* 44 Mich. App. 366, 205 N.W. 2d 209 (1973); *People* v. *Ingeneri,* 7 Ill. App. 3rd 809, 288 N.E. 2d 550 (1972). The commentary to ABA *Minimum Standards,* § 1.4(a) stresses that the procedure will vary from case to case and may involve reading the indictment or explaining the nature of the charge in simple everyday language.

In short, no particular litany or procedure is required. How much and what kind of explanation of the nature

of the charge may be required necessarily varies from case to case. *McCarthy,* 394 U.S. at 467, n. 20; *Eagle Thunder* v. *United States,* 477 F. 2d 1326 (8th Cir.), cert. denied 414 U.S. 873 (1973). This should be especially so where, as in the case at bar, the plea was taken prior to *Boykin, McCarthy,* and the 1966 amendments to Rule 11 requiring the federal district courts to ascertain the factual basis of the plea and address the accused personally in regard to his understanding of the nature of the charge.

Certainly, as was made clear in *McCarthy,* an understanding of the elements of a crime to which a defendant pleads guilty is an important factor to consider in ascertaining the voluntariness of the plea, especially where the charge encompasses lesser included offenses. *McCarthy,* 394 U.S. at 468, n. 20. However, in keeping with its flexible approach to guilty pleas, this Court in *McCarthy* never mandated that an accused be formally advised of all elements prior to a plea, and wisely noted that "matters of reality, and not mere ritual, should be controlling." *McCarthy,* 394 US at 468, n. 20, quoting *Kennedy* v. *United States,* 397 F. 2d 16, 17 (6th Cir. 1968). The ABA *Minimum Standards* referred to in *McCarthy,* 394 U.S. at 466, n. 17, are also silent on whether an accused should be informed of the formal legal elements of a crime prior to a plea. The commentary to the Approved Draft acknowledges that a plea is an admission of all the elements of the charge, and thus requires a "sophisticated knowledge of the law in relation to the facts", but adds that "no specific procedure is required." Thus the precise contours of the defendant's "understanding of the law in relation to the facts" required by *McCarthy* remain to be delineated on a case by case basis.

One of the "matters of reality" that must be considered in this case by case approach is the fact that the elements of a crime comprise a formal legal concept in which lawyers are far better versed than most defendants. Depending

on the circumstances of the particular case a defendant may not appreciate or understand the meaning of the formal legal elements of a crime, and indeed may even be confused by the concept. See *State* v. *Powell,* 109 Ariz. 165, 506 P. 2d 1059 (1973) (en banc). Many able criminal lawyers may feel that the best way to communicate with a particular client is in practical factual language rather than in terms of formal legal elements. To require a recitation to an accused of the legal elements therefore would not in such cases serve or accomplish the purpose intended.

Properly viewed, the elements of a crime are counsel's focus for intelligent legal analysis of a criminal case. This analysis forms the basis of competent legal advice on which an accused has a right to rely. Provided counsel's advice is based on an analysis of the elements of the crime, which was certainly true in this case, a failure by court or counsel to recite them formally to the accused does not mean that the defendant is prejudiced or will not understand the nature of the charge. On the contrary, proper legal advice should give a defendant a "fair understanding of the law in relation to the facts." *McCarthy,* 394 US at 466. This advice should not be a formal litany but should operate to provide the defendant with an actual understanding of the nature of the charge and assure that a factual basis exists for any plea. As a person of limited intelligence, Morgan is precisely the type of defendant for whom a formal litany is least appropriate. The Rule 11 or comparable inquiry should thus be required to do no more than bring out the defendant's understanding of the nature of the charge generally. This would strike a fair balance between the extremes of excessive, sterile ritual and hurried, railroaded pleas.

Another of the "matters of reality" that must be considered in a case by case approach is the nature of the motivations of defendants who plead guilty. A guilty plea often necessarily entails pleading to a lesser or different

crime than that charged in the original indictment. The motivations for such pleas are varied and complex. In such cases, especially in the frequent instances where a defendant's plea is motivated primarily by a desire to reduce his exposure to severe penalties or to obtain a reduced sentence, the plea may be made quite voluntarily in the absence of any need or desire to know the formal constituent elements of the crime charged. See *Cabrera* v. *United States,* 357 F. Supp. 1380 (S.D.N.Y. 1972).

The plain truth is that in many cases guilty defendants are primarily concerned with the sentence rather than with a fine comparison of elements and facts, which was precisely the case with Morgan. The motivations of a defendant who pleads guilty are an obvious and fundamental element in any realistic analysis of the voluntariness of a plea, especially where the motivations are strong ones, as was clearly recognized in *Brady* v. *United States, supra* and *North Carolina* v. *Alford, supra.* Therefore, in assessing the voluntariness of a plea the courts must look not only to what a defendant knows in pleading guilty, but also to the rational motivations of the defendant for pleading guilty in the first place. See *United States ex rel. Brown* v. *LaVallee,* 424 F.2d 457, 460 (2d Cir. 1970), cert. denied 401 U.S. 942 (1971). In this case, Mr. Morgan's plea to second degree murder was an objectively sensible and rational alternative to standing trial for the savage slaying of his benefactor. In the absence of any credible claim of prejudice, a lack of knowledge of formal legal elements does not alter the essential voluntariness of a plea which is made by the defendant in his own best interest, especially where there is a plain factual basis for the plea.

The *per se* rule adopted by the courts below in effect imposes a ritual duty on the courts to inform defendants of all elements of the crime in question on the record in every plea in order to insure the validity of the plea and protect it against distant collateral attack. Such formal

advice is not required even as to waivers of constitutional rights which *Boykin* v. *Alabama, supra,* held are inherent in a guilty plea and ought to be spread on the record. *Wilkins* v. *Erickson,* 505 F. 2d 761 (9th Cir. 1974); *Todd* v. *Lockhart,* 490 F. 2d 626 (8th Cir. 1974); *McChesney* v. *Henderson,* 482 F. 2d 1101 (5th Cir. 1973), cert. denied 414 U.S. 1146; *Wade* v. *Coiner,* 468 F. 2d 1059 (4th Cir. 1972). It would be anomalous indeed to require such a ritual where no constitutional right is involved, but not to insist on a ritual where fundamental constitutional rights are at stake. Since the circumstances of each criminal case are so varied, it is problematical whether such a ritual would even achieve its purported objective.

Further, since in most cases involving violations of the state criminal law intent and knowledge are obvious and self-evident elements of the charge for crimes ranging from the most petty offenses to murder, it would be futile and burdensome to require in every case that the accused be informed of all the formal legal elements of the crime prior to pleading guilty. The courts below did not refer to any evidence that in the vast majority of guilty pleas any such advisement occurs or is necessary, especially in those cases involving less serious crimes. Yet adoption of the *per se* rule endorsed by the courts below will open up to collateral and direct attack on highly formalistic grounds untold thousands of otherwise unassailable convictions. There must come an end to gamesmanship in the criminal law.

Consistent with the practical approach to guilty pleas approved by this Court, the great weight of authority in this country, both state and federal, holds that failure to advise a defendant of the elements of the crime to which he pleads does not, at least by itself, render a plea invalid. *Sappington* v. *United States, supra; United States* v. *Lowe, supra* (see also *United States* v. *Podell,* 519 F. 2d 144, 149 (2d Cir. 1975)); *Cabrera* v. *United States,*

supra; United States v. *Semet, supra; State* v. *Denson,* 110 Ariz. 159, 515 P. 2d 1179 (1973); *State* v. *Duran, supra; State* v. *Powell, supra; State* v. *Ferrell,* 108 Ariz. 394, 499 P. 2d 109 (1972) (en banc); *People* v. *Vest,* 43 Cal. App. 3rd 728, 118 Cal. Rptr. 84 (1974); *People* v. *Krantz,* 58 Ill. 2d 187, 317 N.E. 2d 559 (1974), reversing 12 Ill. App. 3rd 38, 297 N.E. 2d 386 (1973); *People* v. *Jenkins,* 27 Ill. App. 3rd 756, 327 N.E. 2d 294 (1975); *People* v. *Heral, supra; People* v. *Powell,* 21 Ill. App. 3rd 423, 315 N.E. 2d 627 (1974); *People* v. *Diaz,* 15 Ill. App. 3rd 280, 304 N.E. 2d 103 (1973); *People* v. *Tennyson,* 9 Ill. App. 3rd 329, 292 N.E. 2d 223 (1972); *Michels* v. *Brewer,* 211 N.W. 2d 293 (Io. 1973); *State* v. *Hackett,* 201 N.W. 2d 487 (Io. 1972); *People* v. *Baker,* 60 Mich. App. 309, 230 N.W. 2d 409 (1975); *People* v. *Marshall,* 59 Mich. App. 140, 229 N.W. 2d 346 (1975); *People* v. *Norman, supra; People* v. *Anthony,* 33 Mich. App. 344, 189 N.W. 2d 803 (1971); *People* v. *Rainwater,* 28 Mich. App. 519, 184 N.W. 2d 516 (1970); *People* v. *Morgan,* 28 Mich. App. 594, 184 N.W. 2d 471 (1970); *Mathews* v. *State,* 501 S.W. 2d 44, 48 (Mo. 1973); *Jones* v. *State,* 471 S.W. 2d 223, 228 (Mo. 1971); *Fisk* v. *State,* 515 S.W. 2d 865 (Mo. App. 1974); *Contra, People* v. *Kelly,* 536 P. 2d 39 (Colo. 1975); *People* v. *Sanders,* 524 P. 2d 299 (Colo. 1974) (en banc); *Carvalho* v. *Olim,* 519 P. 2d 892 (Haw. 1974); *Coolen* v. *State,* 288 Minn. 44, 179 N.W.2d 81 (1970); *Commonwealth* v. *Ingram,* 455 Pa. 198, 316 A. 2d 77 (1974); *McAllister* v. *State,* 54 Wis. 2d 224, 194 N.W. 2d 639 (1972); *Bressette* v. *State,* 54 Wis. 2d 232, 194 N.W. 2d 635 (1972); see also, *Fraley* v. *State,* 323 N.E. 2d 239, 241, n. 1 (Ind. App. 1975).

No other Circuit Court of Appeals has followed the *per se* rule adopted by the courts below. Those few Circuits which have granted relief for failure of defendants to understand the elements have reached their results in cases

where the charge (conspiracy) was complex, *United States* v. *Cantor, supra; United States* v. *Thomas,* 468 F. 2d 422 (10th Cir. 1972), cert. den. 410 U.S. 935 (1973); see also *Irizarry* v. *United States,* 508 F. 2d 960, 965-966 (2d Cir. 1974); or where the defendant may have relied on erroneous information provided by the court, *United States* v. *Cantor, supra;* or where the plea suffered from additional defects. *United States* v. *Landry,* 463 F. 2d 253 (9th Cir. 1972); *United States ex rel. Crosby* v. *Brierly,* 404 F. 2d 790, 795, 802 (3rd Cir. 1968). *McCarthy* itself, relied on by the courts below in granting the writ, involved comparatively complicated provisions of the Internal Revenue Code. See 394 U.S. at 470-471.

It is clear that failure to advise an accused of formal legal elements of the crime to which he pleads is not by itself dispositive of the voluntariness of the plea; all the relevant circumstances surrounding the plea must be considered.

C. This case is a classic example of the pitfalls of a *per se* rule, because all the relevant circumstances surrounding Morgan's plea compel the conclusion that the plea was voluntary.

This case is a classic example of the pitfalls of a *per se* rule. Save for the single purported failure to recite to the respondent an element of the crime, all the relevant circumstances surrounding Morgan's plea point inescapably to a conclusion that the plea was voluntary.

At the outset, it must be emphasized that the proceedings below were eminently and unquestionably fair. Great solicitude was shown for Morgan by both his counsel and the court. The proceedings were conducted with great patience and dignity. This case bears no resemblance whatsoever to the travesties this Court faced in such cases as *Boykin* v. *Alabama, supra,* and *Chambers* v. *Florida,* 309 U.S. 227 (1942).

Morgan was represented throughout the entire proceedings by two experienced and competent counsel who gave an unstinting effort in his behalf. See 107a. The assistance and advice of counsel has long been recognized as essential in assisting an accused to make important decisions including the decision to plead guilty, and in assuring that those decisions are made intelligently and voluntarily. *Argersinger* v. *Hamlin,* 407 U.S. 25, 34 (1972); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948); *Walker* v. *Caldwell,* 476 F.2d 213 (5th Cir. 1973); *United States ex rel. Brown* v. *LaVallee, supra; Reed* v. *Henderson,* 385 F. 2d 995 (6th Cir. 1967). Respondent unquestionably had that advice and assistance. His two counsel were praised by the trial court as among the best counsel in the area (107a), and counsel devoted the utmost care and attention to Morgan's case.

Additionally, the record shows plainly that Morgan pleaded guilty to second degree murder to avoid the risk of a conviction and mandatory life term for murder in the first degree. Such a choice was a voluntary and reasoned choice among alternatives. *North Carolina* v. *Alford,* 400 U.S. at 31, 37. Respondent's attorneys gamely bargained for a manslaughter plea, but, failing in this, focused their study on the advisability of a plea to murder in the second degree. Morgan's attorneys clearly gave much soul-searching thought to such a plea (52a, 56a, 60a, 61a, 62a, 65a, 68a), but the decision to accept the plea was, in view of all the circumstances, a wise one. The compelling circumstances included the fact that Morgan had gone to the victim's room with a knife on the night of the crime (65a, 100a). This fact by itself made a conviction for murder in the first degree a likely possibility since it evidenced "deliberate and premeditated design to effect death" (former New York Penal Law § 1044).

Moreover, Morgan had motive to commit such a crime. Although motive is not an essential element of the crime under New York law, it may be considered on the issue

of a defendant's connection with the crime and deliberation and premeditation. *People* v. *Sangamino,* 258 N.Y. 85, 179 N.E. 267 (1932); *People* v. *Sanducci,* 195 N.Y. 361, 88 N.E. 385 (1909). Furthermore, a manslaughter charge based on an act committed in the heat of passion (former New York Penal Law § 1050[2]) was negated by respondent's carrying a knife to the room and taking money from it. Morgan's attorneys were also concerned about the fact that the deceased had suffered some forty knife wounds. The very viciousness of the crime made a conviction for murder in the first degree likely, as counsel recognized (67a). Counsel also had to consider that Morgan himself did not deny that he stabbed the deceased and had given a confession.

Of course, no counsel can give advice with absolute confidence that it will achieve the best results. As this Court has said, "(i)n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court . . . Questions like those cannot be answered with certitude." *McMann* v. *Richardson, supra,* 397 U.S. at 769-770 (1970). Thus, an accused is bound by his plea unless he can show a serious dereliction on the part of counsel. *Id.* at 774. No such dereliction has ever been shown or even alleged here. On the contrary, Morgan's two attorneys were dedicated, effective, and thoroughly professional in the cause of their client.

Under all the above circumstances, Morgan's decision to plead guilty to murder in the second degree was clearly advantageous given the strong possibility of a conviction of murder in the first degree following a trial. As such it was a "voluntary and intelligent choice among the alternative courses of action," *North Carolina* v. *Alford,* 400 U.S. at 31, and based on advice well within the range of competence demanded of attorneys in criminal cases. *McMann* v. *Richardson,* 397 U.S. at 771. The certainty of conviction for first degree murder and the prospect of a lesser

sentence were clearly what motivated respondent to plead guilty, as Morgan himself emphasized at the federal evidentiary hearing (38a-41a).

Morgan's self-serving claim that he would not have pleaded guilty if he had known that intent was an element of the crime of murder in the second degree must thus be viewed in the light of his testimony that he pleaded to second degree murder because he expected a lesser sentence and in light of the fact that such a claim was belatedly asserted years after the plea when the prosecution's ability to prove its case was inevitably hampered by time lost. The courts below found that Morgan was in fact advised of the consequences of his plea insofar as his sentence was concerned, contrary to his claim. This too is a critical factor in assessing the voluntariness of a plea. *Marvel* v. *United States,* 380 U.S. 262 (1965); *McCarthy,* 394 U.S. at 464; Rule 11, ABA *Minimum Standards* § 1.4(c). Significantly, respondent never took an appeal from his conviction and delayed five years before making any post-conviction claims. No excuse for this five year delay in protesting the sentence as unexpected has ever been made. Moreover, the record indicates no surprise by either defendant or his counsel when sentence was pronounced (108a-109a). Under applicable law, these factors also militate in favor of the voluntariness of the plea. *Kercheval* v. *United States,* 274 U.S. at 224 (1927); *United States ex rel. Sniffin* v. *Follette,* 439 F. 2d 1082 (2d Cir. 1971); *United States ex rel. Brock* v. *LaVallee,* 306 F. Supp. 159 (S.D.N.Y. 1969).

Morgan's plea is manifestly voluntary in any meaningful sense as a reasoned decision knowingly and intelligently entered into on the advice of experienced counsel. In such a case there is no practical significance to the purported failure to advise respondent of any formal legal element of the crime. *Cabrera* v. *United States, supra.* Significantly Morgan has never made any claim that he was prejudiced in that he may have had a credible defense to a

homicide charge alleging intent. Morgan has never denied the slaying itself, and in fact admitted it to his attorneys (65a).*

Notwithstanding the purported failure to advise respondent of the elements, there can be no doubt that there was an independent factual basis for the plea from which the element of intent could be clearly inferred, as Morgan's attorney clearly recognized (59a). The facts of the case as stated in detail by Morgan's own counsel at the sentencing proceeding (98a-102a), clearly established a factual basis for a plea to second degree murder.** See discussion *ante*, at 4-5, 23-24. Although counsel suggested that Morgan meant no harm, he took his knife to the victim's room (100a), this does not negate the possibility that he had a design to effect death at the time he actually stabbed decedent, even if it was not premeditated. Furthermore, under New York law the design to kill which is necessary to a conviction for second degree murder can be demonstrated by multiple knife wounds in the decedent. *People* v. *Davis*, 18 App. Div. 2d 644 (1st Dept. 1962), affd. 13 N Y 2d 1151, 247 N.Y.S. 2d 140 (1964). Thus Morgan's plea was not only voluntary, but also accurate. The plea fairly reflected the relationship of the law to the facts. Even the District Court believed there was a factual basis for the plea (78a).

Of course, even a defendant with knowledge of the elements of a crime could deny those elements and still

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* See Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. Law Rev. 142 (1970); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250, 264-275 (*Powell*, J. concurring); *Ralls* v. *Manson*, 503 F. 2d 491, 494 (2d Cir. 1974) (*Lumbard*, J. concurring).

** In pre-*McCarthy* and pre-*Boykin* cases, it was proper to ascertain the factual basis at the sentencing stage rather than the plea stage. *X.* v. *United States*, 454 F. 2d 255 (2d Cir. 1971), cert. denied *sub nom. Jones* v. *United States*, 406 U.S. 961 (1972); *Manley* v. *United States*, 432 F. 2d 1241 (2d Cir. 1970).

plead guilty in a proper case. *North Carolina* v. *Alford*, *supra*; *People* v. *Serrano*, 15 N Y 2d 304, 309-310, 258 N.Y.S. 2d 386, 389-390; 206 N.E. 2d 330, 333 (1965). Indeed, under New York law Morgan could have entered a valid guilty plea to a hypothetical non-existent crime or a crime for which there is no factual basis as part of a reasoned, negotiated plea bargain. *People* v. *Clairborne*, 29 N Y 2d 950, 329 N.Y.S. 2d 580, 280 N.E. 2d 366 (1972); *People* v. *Foster*, 19 N Y 2d 150, 278 N.Y.S. 2d 603, 225 N.E. 2d 200 (1967). Under these circumstances, the purported failure to inform Morgan of the formal legal elements of an actual crime was not materially significant where his plea in fact had a plain factual basis and was clearly entered as part of a negotiated plea bargain.

The purported failure to inform respondent that intent was an element of murder in the second degree is, in any event, of minimal importance on the facts of this case. The court told Morgan in simple everyday language that he was accused of killing Ada Francisco, and Morgan said he understood this (93a). Additionally, the indictment charging murder in the first degree and accusing respondent of killing and stabbing Ada Francisco "willfully . . . and of malice aforethought" was read out in open court in Morgan's presence at his arraignment (85a). This in itself was sufficient to give Morgan notice of the nature of the charge against him. See *Paradiso* v. *United States*, *supra*; *United States* v. *Semet*, *supra*; *People* v. *Ingeneri*, *supra*; *People* v. *Norman*, *supra*. The element of intent, or more accurately "design" as set forth in the statute defining murder in the second degree, is not so radically different from the wording or plain meaning of the indictment charging murder in the first degree and read out in open court as to require as a matter of constitutional law that respondent be formally advised of the change.

Finally, it is noteworthy that before offering his plea, Morgan was afforded three weeks of psychiatric evaluation

to determine whether he was fit to proceed (91a, 107a). He stated in pleading that he knew he was giving up his right to a jury trial and he had stated earlier at his arraignment that he understood he was entitled to a trial (86a, 93a, 94a). When he failed to understand what was being said to him, he said so (86a, 87a). Thus, in entering into his plea bargain Morgan was clearly aware of his basic alternatives and was possessed of the competency to choose among them.

The courts below were not sitting in a supervisory capacity to review proceedings of the Fulton County Supreme Court. They could grant federal habeas relief only for a fundamental constitutional defect in the proceedings in which Morgan was convicted. Nonetheless, the courts below held Morgan's pre-*Boykin* and pre-*McCarthy* guilty plea to a heinous murder involuntary as a matter of law for the single isolated and formalistic failure to recite to Morgan the formal elements of the crime to which he pleaded. This was a travesty. The facts of this case make it clear that Morgan suffered no injustice, let alone fundamental unfairness in his criminal proceedings. The only unfairness in this case is that which will be borne by society if this guilty plea and untold thousands of other musty guilty pleas are now invalidated by the application of this mechanistic rule. On the entire record, all the relevant circumstances compel a conclusion that Morgan's plea was voluntary in any meaningful sense of the word. To hold otherwise, as the courts below did, elevates form over substance, ritualizes the criminal law for no purpose, and empties the basic concept of voluntariness of all meaning.

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York, November 24, 1975.

Respectfully submitted,

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